82-6771

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM HENRY FLAMER,

Petitioner

v.

STATE OF DELAWARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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82 6771

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner William Henry Flamer prays that a Writ of Certiorari issue to review judgments of the Supreme Court of Delaware, entered on February 7, 1983, in Flamer v. State, ___A.2d _____(Del. Supr., 1983).

QUESTIONS PRESENTED

Does the Sixth Amendment of the U.S. Constitution require that a defendant have the assistance of counsel when interrogated by the police after commission of judicial proceedings?

Does the Fifth Amendment of the U.S. Constitution preclude convictions under the same statute, for violations of different subsections which have different elements, and the end result is still Murder in the First Degree?

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OPINION BELOW

The Opinion of the Supreme Court of the State of Delaware, dated February 7, 1983, in the case of Petitioner, William Henry Flamer, is reproduced at Appendix "A". A Motion for Reargument was denied, by Order dated February 18, 1983; a copy of the Order is reproduced at Appendix "B".

JURISDICTION OF THE COURT

On February 7, 1983, the Supreme Court of the State of Delaware issued its Opinion in Flamer v. State, ____A.2d_____ (Del. Supr., 1983), affirming Petitioner's convictions on four counts of Murder First Degree, one count of Robbery First Degree, one count of Possession of a Deadly Weapon during the Commission of a Felony, and one count of Theft (misdemeanor). The Court considered in its Opinion of February 7, 1983, only issues asserting grounds for appeal applicable to the guilt phase of the Trial, reserving issues pertaining to the death penalty imposed by the jury, pending disposition by the Supreme Court of the United States of Zant v. Stephens, _____U.S._____,102 S. Ct. 1856 (1982) and Barclay v. Florida, _____U.S._____,51 U.S.L.W. 3362 (1982). Jurisdiction of the Supreme Court of the United States to hear this case on Writ of Certiorari is invoked pursuant to 28 U.S.C.§1257 (3). An Order was signed April 12, 1983, by the Honorable Warren E. Burger, Chief Justice of the United States, granting Petitioner until and including May 19, 1983, to file his Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five:

No person shall be held to answer for a capital or

otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution,Amendment Six:

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment Fourteen, Section One:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The following Delaware Statutes are involved in this

case: 11 Del. C. §§222(5), 636 (1) and (2). 832(1), 841 and 1447.

11 Del. C. §222(5):

Deadly weapon includes any weapon from which a shot may be discharged, a knife of any sort (other than an ordinary pocketknife carried in a closed position), switchblade knife, billy, blackjack, bludgeon, metal knuckeles, slingshot, razor, bicycle chain or ice pick.

11 Del. C. §1447:

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during the commission of a felony.
Possession of a deadly weapon during the commission of a felony is a class B felony.

(b) Notwithstanding §4205 of this title, the minimum sentence for a violation of this section shall not be less than 5 years which minimum sentence shall not be subject to suspension and no person convicted for a violation of this section shall be eligible for parole or probation during such 5 years.

11 Del. C. §636 (1) and (2):

A person is guilty of murder in the first degree when:
(1) He intentionally causes the death of another person; or
(2) In the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person.

Murder in the first degree is a class A. felony, and is punished as provided in §4209 of this Criminal Code.

11 Del. C. §832 (1).

A person is guilty of robbery in the first degree when he commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime:
(1) Causes physical injury to any person who is not a participant in the crime.

Robbery in the first degree is a class B felony.

11 Del. C.§841

A person is guilty of theft if he, in any capacity legally receives, takes, exercises control over, or obtains property of another person which is the subject of theft, and fraudulently converts same to his own use.

Theft is a class A misdemeanor, unless the value of the property is $100 or more, in which case it is a class E felony.

STATEMENT OF THE CASE

Alberta and Byard Smith were found stabbed to death in their home on the morning of February 7, 1979. An ensuing police investigation developed William Henry Flamer, Petitioner, as a suspect. The police proceeded to the residence of Petitioner, the home of his grandmother, in Harrington, Delaware, approximately two hundred yards from the home of the victims. Petitioner's grandmother asked the police if they wished to search Petitioner's upstairs bedroom and during that search the police found frozen food packages, similar to those found at the crime scene. Downstairs the police found a bayonet with what appeared to be dried blood on the blade. In a kitchen closet the victims' television set was discovered. Armed with this information, Delaware State Police Detective Chaffinch secured a warrant for Petitioner charging Murder in the First Degree.

Petitioner was apprehended by Detectives Callaway, Brode and Porter, as Detective Chaffinch waited at Magistrate Court #6 for the arrest warrants. Petitioner was then transported to the parking lot of the Court, and thence directly to Delaware State Police Troop 5, for interrogation, without being taken into the Court. When asked why Petitioner was not taken into Court for arraignment, since an arrest warrant for

Murder in the First Degree had already been issued, Detective Callaway maintained that Petitioner had not been processed. "I have no fingerprints and no photographs. I have no interview." When confronted by the fact that Petitioner would be held on a non-bailable offense, Detective Callaway admitted that Petitioner would not be released under any circumstance.

By 4:00 p.m., Detective Chaffinch had arrived back at State Police Troop 5; Petitioner was already at the Troop. The first officer to have any contact with Petitioner at Troop 5 was Detective Porter, who gave Petitioner his Miranda warnings and conducted an interview. Petitioner at first told Detective Porter that a Johnny Christopher had killed the victims and all that Petitioner did was assist in loading stolen property into a car. Questioning continued until 7:30 or 8:00, at various times by four different officers, Detectives Chaffinich and Calloway, Corporals Brode and Porter. Detective Chaffinch was not sure whether Petitioner was questioned in a cell or in an office. Detective Chaffinch noted that Petitioner appeared slightly under the influence of alcohol during the initial contacts. Also noted by Detective Chaffinch were the presence of scratches on parts of Petitioner's body, and what appeared to be dried blood under his fingernails. Subsequently, that night petitioner related to the police that his co-defendant, Andre Deputy, had come to his residence in the victims' car and wanted his help in loading stolen property. Petitioner entered the Byard's house, saw the bodies on the floor. He got blood on his clothes and fingernails, helping Andre Deputy load the stolen property into the car.

At the end of this questioning period, Detectives Calloway and Chaffinch drove to the next town to get food for Petitioner, despite snowy roads.

During the period from 4:00 p.m. to 8:00 p.m., neither defendant asked to call an attorney, nor did anyone of the officers place a call to the Public Defender. The only reference to an acknowledgement of the meaning of the Miranda warnings was Detective Porter's statement that both defendants "just shrugged" in response to whether they understood the warnings. Detective Porter did not elaborate on the meanings of any of the rights, but stated, "He, Flamer, should have told me he wanted an attorney." Defendant recalled that he had told the police that he knew his rights and that he could not afford an attorney and wanted to call his mother to see if she could help him.

Detective Chaffinch maintained that the reason Petitioner was not taken to a Magistrate for arraignment on the night of the 7th, was the poor road conditions. Detective Chaffinch stated during the Suppression Hearing that the nearest open Court would have been Court 7 in Dover, a considerable distance from Troop 5. Detective Chaffinch admitted that the roads were not so hazardous as to prevent him from going home; during the Suppression Hearing, he indicated that he simply did not want to "go clear to Dover."

The next day, Detective Porter accompanied Detective Calloway and Petitioner to Court 6 for arraignment. Petitioner was allowed to call his mother from Court 6, but was told that his mother would have to meet him at Troop 5, since he was going to be immediately transported back to that location for further questioning. After arraignment, Petitioner was committed to

prison. His commitment was delayed by Detective Callaway taking him back to Troop 5 for further interrogation. Petitioner's mother was allowed to see Petitioner only in the company of another police officer, and then left. Later, at approximately 1:00 p.m., Detective Porter entered the cell and asked Petitioner, "Do you believe in God." Petitioner answered in the affirmative. Detective Porter continued, "Then you got to believe in heaven and hell, right? Well, then you are going to burn in hell unless you get straight with me about what's happened...yesterday. I want you to tell me. You have to clear your conscience of what's going on." At this point, Petitioner started "weakening" and began to cry, responding that he would talk to the Detective. Petitioner was removed from the cell and a taped statement was obtained. (T-265-266). While there was a Miranda warning as part of the taped interview, there was no Miranda warning part of Detective Porter's "Christian Burial" speech while defendant was still in the cell. Petitioner implicated himself in the crime. Total interrogation time from the time of arrest until transportation to prison was twenty-four hours.

Petitioner was subsequently indicted for four counts of Murder in the First Degree (two counts of intentionally causing the deaths of Alberta and Byard Smith; two counts of recklessly causing the deaths of Alberta and Byard Smith in the course of and in furtherance of the commission of the crime of robbery, a felony);one count of Robbery in the First Degree, against two victims; one count of Possession of a Deadly Weapon During the Commission of a Felony, Murder in the First Degree; one count of Theft Felony. Trial was commenced on January 24, 1980. At trial, Petitioner's statement made in response to Detective Porter's

February 8, 1979, questioning was introduced, over defense objections. On February 7, 1980, the jury returned a guilty verdict as to all counts. At a separate penalty hearing, before the same jury, the jury returned a penalty of death. On February 12, 1980, the Honorable William G. Bush imposed the death penalty on each of the four counts of Murder in the First Degree. Notice of Appeal was timely filed to the Supreme Court of the State of Delaware on March 3, 1980.

REASONS FOR GRANTING THE WRIT

1. The Sixth Amendment of the United States Constitution requires that a defendant have the assistance of counsel, when interrogated by the police, after the commencement of judical proceeding, and any statement taken in violation of the right to counsel must be suppressed.

The Supreme Court of Delaware, through Justice John J. McNeilly, when confronted with a post-arraignment statement of Petitioner, immediately assumed that Petitioner had a Sixth Amendment right to counsel, but went on to evaluate the totality of the circumstances to determine whether there had been a waiver of that right. Petitioner submits that the Supreme Court of Delaware erred in its examination of the issue of waiver by its Fifth Amendment standards, and not those involving the Sixth Amendment right to counsel.

The Court has held that Due Process requires that counsel be appointed for indigents in all capital cases. Bute v. Illinois, 333 U.S. 640, 676 (1948); Powell v. Alabama, 287 U.S. 45 (1932). This Court has further recognized the need for counsel at critical pre-trial stages of police interrogation, since a Constitution that guarantees a defendant aid of counsel at trial must likewise grant a defendant, already charged and

arraigned, counsel during police confrontation. Massiah v. United States, 337 U.S. 201, 204 (1964); Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring). In Brewer v. Williams, 430 U.S. 387, 398 (1977), this Court has determined that the most critical period of the proceedings against a defendant begins at arraignment and contines through trial. As this Court has recently held in a capital case where a defendant underwent a court-ordered psychiatric examination, the assertion of rights under the Fifth Amendment often depends upon the legal advice of one trained in the law. Estelle v. Smith, 451 U.S. 454, 471 (1981). Counsel therefore protects against the abuse and unknowing loss of rights. See United States v. Ashe, 413 U.S. 300, 306-309 (1973).

The incriminating statements taken from Petitioner were clearly made after arraignment and commitment to jail. Judicial proceedings had commenced and Petitioner was clearly entitled to counsel. Massiah, supra. Petitioner's case is very similar to the case of Brewer v. Williams, supra. The defendant in Brewer was arraigned and represented by counsel. On return to jail, defendant was given a "Christian Burial" speech and in response incriminated himself. This Court indicated that the detective had deliberately set out to elicit information from Williams, just as surely and perhaps more effectively, than if he were formally interrogated. Id., at 399. In the instant case, Petitioner was the subject of the same psychological ploy, deliberately invoked to secure a response. And as in Brewer, there is no showing in Petitioner's case that the right to assistance of counsel was waived, other than a recitiation that Petitioner understood his

rights given pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

It is incumbent upon the State to prove that Petitioner intentionally relinquished or abandoned his right to have counsel after his arraignment. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Every reasonable presumption is against waiver, Brewer, supra at 404. This strict standard applies to any waiver of the right to counsel, whether at trial, or, as in this case, at any critical stage of the adversarial proceeding. Schneckloth v. Bustamonte, 412 U.S. 218, 238-240 (1973). SInce this case involves the waiver of the Sixth Amendment right to counsel, and not the Fifth Amendment right against self-incrimination, Petitioner submits that there is a heavier burden placed upon the State to show an intentional abandonment by Petitioner of his right to counsel.

The record shows that after Petitioner was given the modified "Christian Burial" speech by Detective Porter and agreed to make a statement, Petitioner was given the standard Miranda warning. There was not explanation of the right to counsel, even to a man who was obviously very emotionally distraught. When asked whether he elaborated on the right to counsel more than in the standard Miranda warning, Detective Porter simply stated that Petitioner should have told him that he wanted the advice of counsel.

As noted previously, the role of counsel protects an accused not only against the abuse or rights, but also the unknowing loss of rights. United States v. Ashe, supra. While this Court has recognized that an accused has the right in a state court proceeding to conduct his own defense and waive the right to counsel, if he voluntarily and intelligently elects to do so, Faretta v. California, 422 U.S. 806, 807 (1975), this

right is predicted on the proposition that an accused must have an understanding of the consequences of the absence of counsel, and the possible loss of rights other than that of counsel. A layman, such as Petitioner, could hardly be aware of the boundaries, nuances, or scope of the rights, not only the Fifth Amendment, but Sixth Amendment, that he was waiving; the assertion of a right, or a knowing, intelligent and voluntary waiver thereof depends upon legal advice from someone skilled and trained in the law. Maness v. Meyers, 419 U.S. 449, 466 (1975).

In a record devoid of any other fact than Petitioner stating that he knew his rights, and further compromised by the statement of Detective Porter that Petitioner should have told him that he wanted an attorney, there is no showing that Petitioner understood the far-reaching consequences of the absence of counsel. No effort was made to contact an attorney, even though an attorney from the Office of the Public Defender would have been available upon a simple telephone call. See Estelle v. Smith, 451 U.S. 454, 474 (1981) (Rehnquist, concurrence). Petitioner did not volunteer the statement, but gave a taped "confession" only after the use of a psychological ploy designed explicitly to ellicit a confession. Therefore, it must be presumed that there was not an intentional and intelligent waiver of Petitioner's right to counsel.

This fact situation differs little from that in United States v. Mohibar, 624 F.2d 1140 (C.A.2d, 1980). Appellant was given no more than the standard Miranda warning and was told that he had been indicted. The Mohibar Court noted that Brewer, supra, 430 U.S. at 404 required greater warnings than would be customary in normal pre-adversarial interrogations, since an effective

waiver requires both comprehension and relinquishment. In Brewer, id, the defendant had his understanding of the right to counsel reinforced by numerous pre-interrogation consultations with his lawyers. Petitioner could hardly be in a position to know the gravity of his waiver of his right to an attorney and therefore lacked the comprehension to make such a waiver. This Court has held in Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948) that in the trial context, before a defendant can plead guilty or represent himself pro se, an impartial judge must conduct a penetrating and comprehensive examination of the defendant in open court; to be a valid waiver, the defendant must understand the nature of the charges against him, the statutory offenses included, the possible punishments, defenses and mitigating circumstances, and all other facts lending to a broad understanding of the whole matter. Since this Petitioner had been arraigned, and the adversarial proceeding had begun, a mere recitation that Petitioner understood his Miranda rights hardly rises to the standards required in Von Moltke, id.

11. The Fifth Amendment of the United States Constitution precludes convictions under the same statute, for violations of different subsections which have different elements, where the end result is still Murder in the First Degree.

Your Petitioner was convicted of four counts of Murder in the First Degree, for the deaths of two victims. Two different subsections of 11 Del.C. § 636 were stated in the Indictment, each charging Petitioner with the Murder of the Exact same victim. The only distinguishing characteristics of the two subsections are the elements of the crime itself: in subsection (1), a defendant "intentionally causes the death of another person," and in subsection (2), a defendant "in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person." Petitioner submits that his convictions violate the Double Jeopardy Clause of the Fifth Amendment, in that he is being convicted twice for the exact same offense.

This Court's most recent pronouncement in Missouri v. Hunter, ____U.S.____, 74 L. Ed. 2d 535 (1983) that the Double Jeopardy Clause does not prevent cumulative punishment under two separate statutes that proscribe the same conduct, where legislative intent clearly supports such convictions, does not apply in Petitioner's case. The Double Jeopardy Clause prevents the sentencing court from prescribing greater punishment than the Lesislature intended. Id., 74 L.Ed. 2d at 542. In the case of 11 Del.C. § 636, the Delaware Legislature defined Murder in the First Degree by three different, mutually exclusive definitions, each having different elements, according to the facts of a given case. It is clear that the Legislature did not intend that a defendant be charged with numerous counts of Murder in the First Degree, in one homicide case, convicted under the mutually

exclusive subsections of the same statute, and then sentenced consecutively for multiple violations of the same statute.

In Petitioner's case, 11 Del.C § 636 provides two different definitions of Murder in the First Degree: that a defendant, "intentionally causes the death of another person, or (emphasis added) in the course of and furtherance of the commission or the attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person." By the use of the word "or" the Delaware Legislature clearly intended that the crime could be accomplished by two mutually exclusive means, according to the special facts of each case; there is no indication whatsoever that the Legislature intended that Petitioner be sentenced twice to die for death of one victim. Under these circumstances, the Double Jeopardy Clause clearly protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

CONCLUSION

To resolve the questions concerning the violation of Petition's right to counsel and the effectiveness of a waiver of that right, and the scope of the Double Jeopardy Clause of the United States Constition pertaining to four convictions of Murder in the First Degree where there were only two victims, Petitioner, William Henry Flamer, submits that this Petition should be granted.

Respectfully submitted,

RICHARD M. BAUMEISTER
Assistant Public Defender
State Office Building
820 N. French Street
Wilmington, Delaware 19801

AFFIDAVIT OF MAILING

STATE OF DELAWARE)
:
NEW CASTLE COUNTY)

Elaine Plittman, having been duly sworn, according to law, depose and say that I caused the foregoing Writ of Certiorari to be hand delivered to:

John A. Parkins, Jr., Esq.
Deputy Attorney General
State Office Building
820 N. French Street
Wilmington, Delaware 19801

Elaine Plittman
Elaine Plittman

sworn to and subscribed before me this 18th day of May, 1983.

Joseph R. Slights
Notary Public

RECEIVED
MAY 19 1983
OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

82 6771

WILLIAM HENRY FLAMER,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

A-819

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM HENRY FLAMER,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

A-819

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner hereby moves the Court for leave to proceed in forma pauperis and without prepayment of fees. Petitioner has been found to be indigent by the Office of the Public Defender of the State of Delaware.

Respectfully submitted,

RICHARD M. BAUMEISTER, ESQUIRE
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Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM HENRY FLAMER,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

A-819

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORM PAUPERIS

I, William Henry Flamer, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; that I was represented at all steps in the proceedings before the courts, including the Supreme Court of the State of Delaware by the Office of the Public Defender and therefore no leave to proceed in forma pauperis was required.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the matter are true.

1. Are you presently employed? No.

(a). If the answer is yes, state amount of your salary

or wages per months and give the name and address of your employer.

(b). If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? I have been incarcerated since February 7, 1979. I have no other source of income since my incarceration.

(a). If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

(a). If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothings)? No.

(a). If the answer is yes, describe the property and state its approximately value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. I have no financial resources, although I am under Court order to pay support to my daughter, Andrea Denise Hughes.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William Henry Flowers

WILLIAM HENRY FLOWERS

SUBSCRIBED AND SWORN TO before me this 11 day of May, 1983.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefore.

NOTARY PUBLIC

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM HENRY FLAMER,	§	
	§	
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	No. 60, 1980
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 24, 1982
Re-submitted following supplemental briefing: December 6, 1982
Decided: February 7, 1983

Before HERRMANN, Chief Justice, McNEILLY, QUILLEN, HORSEY and MOORE, Justices, constituting the Court en Banc.

Upon appeal from Superior Court. Affirmed except as to sentence of death. Jurisdiction is reserved as to death sentence. Mandate withheld.

Dana Reed, Deputy Attorney General, Dover, John A. Parkins, Jr. (Argued), Deputy Attorney General, Wilmington, and Gary A. Myers (Argued), Deputy Attorney General, Georgetown, for plaintiff below, appellee.

Dennis A. Reardon and Richard E. Fairbanks (Argued), Assistant Public Defenders, Dover, for defendant below, Appellant.

Appendix "A"

McNEILLY, Justice:

At approximately 8:00 A.M. on a snowy February 7, 1979, Arthur Smith, thirty-five year old son of Alberta and Byard Smith, walked across the street to his parents' home and found them sprawled on the living room floor obviously murdered in cold blood.[1] The ensuing police investigation led to the arrest, separate jury trials, convictions and mandated death sentences for Andre Deputy and William Henry Flamer. In this appeal we are concerned only with the convictions and sentences of William Henry Flamer and the record of the suppression hearing held before the Court prior to the severance for trial of the charges against the two individuals, Flamer and Deputy.

William Henry Flamer appeals his convictions and sentences on four charges of Murder in the First Degree, one charge of Robbery in the First Degree, one charge of Possession of a Deadly Weapon During the Commission of a Felony, and one charge of Misdemeanor Theft. As to the four counts of Murder in the First Degree the jury in a separate hearing following the guilt phase of trial, mandated the death penalty. For reasons hereinafter stated we only consider at this time the asserted grounds for reversal applicable to the guilt phase of trial, reserving jurisdiction on the issues raised with respect to the mandated death penalty.

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1. When the victim's bodies were examined by Dr. Judith G. Tobin, a forensic pathologist and Assistant State Medical Examiner, it was established that the cause of death of each victim was massive hemorrhage due to multiple stab wounds of the head and neck. In the case of Byard Smith, Dr. Tobin counted and measured seventy-nine wounds; sixty-four involving the head and neck, thirteen involving the posterior shoulders and back, and two defense wounds on the hands. In Alberta Smith's case, Dr. Tobin determined that she had a total of sixty-six wounds; twenty-six of the head and neck; twenty-nine on the anterior trunk; eight on the posterior or her back, and three defense wounds on her hands and arms.

As Arthur Smith approached his parents' home that morning he first noticed the car was gone. Receiving no acknowledgment of his presence Arthur entered the house and saw his dead bloody parents lying on the floor. He noticed that their television was missing, but without further investigation he went to a garage across the street and called the police.

In response to Mr. Smith's call received at Troop 5 in Bridgeville, State Police officers, Daral Chaffinch and Raymond P. Callaway, Jr. proceeded to the victims' home, a small two-story house just west of the Harrington town limits fronting on State Highway Route 14. Entrance into the home is gained through a side door which opens into the kitchen. On the highway side of the kitchen there is a living room and a small unused front room. The victims' bodies were found on the floor of the living room with apparent stab wounds in the throat and chest areas. Byard Smith's trouser pockets were turned inside out, chairs were overturned, bags of frozen food were strewn about the kitchen floor, and there was what appeared to be blood on the floor around the victims and on the couch next to the body of Alberta Smith. A sofa cushion also had apparent cut marks around the blood stained area.

Earlier that morning Clara Green of Felton, Delaware was awakened by the flashing lights of a four door car parked on the opposite side of the road from her home on Church Street near the town limits of Felton. She went back to sleep but sometime between 7:30 and 8:00 A.M. she awakened again and noticed the car still

there with its lights flashing and motor running. After breakfast she saw a man walking toward downtown Felton with a suitcase and something else under his arm. The man she saw was dressed in dark clothes and cap, and appeared to be a black man. At that time the car was not running and the lights were out.

At approximately 10:30 A.M. the investigating officers received a call from Troop 3 that one of their officets had recovered the Smiths' vehicle on Church Street just north of the town limits of Felton. Upon receiving that information the officers proceeded to Felton and interviewed possible witnesses. Among those interviewed was Mrs. Green and William Wooters who at approximately 7:30 that morning had opened the Felton Hardware Store where he worked. Within an hour or so a man entered the store and asked to use the phone. Wooters later that morning gave the police a description of that man which led to the identification of defendant, William Henry Flamer, by a daughter of the victims who knew Flamer because of their family ties. Flamer's mother was a half-sister to Alberta Smith, one of the victims, and both families had always lived in close proximity to each other.

The police then went to the Flamer residence at 147 Mispillion Street in Harrington, approximately two hundred yards distance from the victims' home. Mrs. Florence Benson, grandmother of defendant Flamer, answered the door, and after informing Detectives Chaffinch and Callaway that Flamer was not at home, asked them in to look for themselves. The house is a two-story four room house heated only by a wood stove in the living room. At the time the detectives

entered no one appeared to be downstairs except Mrs. Benson and a man identified as William Johnson, Flamer's father.[2] Mrs. Benson asked the detectives if they wanted to go upstairs. They replied in the affirmative, and as soon as they walked into Flamer's bedroom a cardboard box was observed containing frozen food packaged in bags of the same type as those strewn about the victims' kitchen floor. Downstairs they found a bayonet on a stand in the kitchen with what appeared to be dried blood stains on the blade. They also found a suitcase and, in the kitchen closet, a television set which was identified a short time later by Arthur Smith as the television set missing from his parents' home. Armed with this evidence the detectives went to Justice of the Peace Court 6 in Harrington and obtained a warrant for Flamer's arrest for Murder in the First Degree.

While at Court 6 information was received that Flamer was at the Blue Moon Tavern, south of Woodside on Route 13. Detective Callaway, Corporal Porter, Detective Brode and two Harrington police officers were dispatched to the location for the purpose of apprehending Flamer. Corporal Porter volunteered to join the group because he was a lifelong resident of Harrington and had known Flamer for a long time. Flamer, Andre Deputy, and Ellsworth Coleman were

2. It was later learned that Mrs. Benson, Flamer and his father, and Andre Deputy, the co-defendant, whose trial was severed from the Flamer trial, all lived in the house at that time.

apprehended walking near the Tavern and were taken to Troop 5 at Bridgeville. Coleman was soon released; Flamer, of course, had been arrested; and Deputy was detained for further questioning. Corporal Porter had become suspicious of Deputy because he gave his name as Ray Anderson, a resident for one year of Harrington, and Porter had a feeling that if Anderson was, in fact, a year long resident of Harrington he would have known him by name or sight, since Harrington is a small town of approximately twenty-five hundred people. In addition, Corporal Porter felt Deputy was being evasive, and he was not sure of Deputy's connection with Flamer and the murders. In any event, at Troop 5 Corporal Porter, for his own safety, patted down Deputy and discovered in his coat pocket two watches, folded money, and a black wallet containing victim Byard Smith's Delaware driver's license with the victim's picture on it, an automobile registration card in the name of Byard Smith, a newspaper coupon, thirty-nine dollars, and Byard Smith's Social Security card.

The questioning of Flamer and Deputy, sometime separately and at least once together, continued from approximately 4:00 o'clock in the afternoon until 7:30 or 8:00 o'clock in the evening. During the interrogation Detective Chaffinch noticed what appeared to be blood around the cuticles of the fingernails on both hands of Flamer. Likewise there appeared to be blood on the sleeves of Flamer's coat and fresh scratches on his neck and chest. When questioned about the blood on and about his person Flamer stated

that at Deputy's request he had gone to the victims' home with Deputy after the murder and had gotten blood on his coat and hands by moving frozen food packages. Testifying in his own defense Flamer stated on direct examination that he also had gotten blood on his shoes, specifically stating:

> "Because there was blood all over them from the floor. Like the area, the place was all bloody and messy and stuff and I had blood on my shoes so I wiped it off."

When confronted with Deputy's claim that he (Flamer) had given Deputy the victim's wallet and watches, Flamer vehemently denied the truthfulness of Deputy's claim, and continued to deny it when Deputy repeated the claim in a face-to-face confrontation during the initial police interrogation. Corporal Porter testified that during this interrogation of Flamer, Flamer told him that he, Deputy and an individual by the name of Johnny Christopher went into the victims' home, that Johnny had been the one who did the stabbing, and that he had gotten blood on his coat as a result of Christopher running in the house and handing out the frozen food and other property. Corporal Porter also testified that it was at this time Flamer whispered to him that Ray Anderson was really not Anderson but was, in fact, Deputy who was wanted for an unrelated murder in Wilmington.

Throughout the interrogation on the afternoon of the seventh the police were given irreconcilable stories by both Flamer and Deputy, each accusing the other of the murders. Finally, between 7:00 and 7:30 P.M. interrogation ceased for the night. Flamer

was placed in the troop cell for the night, and Deputy was taken to a cell in the Bridgeville police station. The cell at the troop was described by Detective Callaway as a heated holding area approximately four feet wide and fifteen feet long. Detective Callaway stated that the cell has two lights, two windows, two steel bunks furnished with army blankets, running water to drink and use for washing, and a toilet. To the contrary Flamer testified that the troop cell was cold, and that he was dressed only in a silk tee shirt and army pants and that he was furnished no blankets for warmth.

No effort was made by the police that night to take Flamer to Court for arraignment since the roads were hazardous due to snow, and the closest Justice of the Peace Court open that night was Court 7 in Dover. To have taken Flamer to court for arraignment that night would have necessitated driving from Bridgeville to Dover and then back to Georgetown to the Sussex Correctional Institution.

The next morning Detectives Porter and Brode without further interrogation, took Flamer to Justice of the Peace Court No. 7 for his initial appearance pursuant to Justice Peace Criminal Rule 2. At that appearance Rule 2(b) requires that the Justice of the Peace inform the defendant of the complaint against him, of his right to retain counsel, and of his right to have a preliminary hearing. He shall also inform the defendant that he is not required to make a statement, and that any statement made by

him may be used against him. The committing Justice of the Peace shall also allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail (except in capital cases as here).

At this initial appearance Flamer was committed without bail to the Department of Corrections. Since there was no constable or other court officer to take defendant into custody the police returned defendant to the police troop to await transportation to the Correctional facility in accordance with normal state police operating procedure by a traffic uniformed officer.

While at Justice of the Peace Court No. 7 defendant had called his mother who then met defendant at the troop as requested. According to defendant, Corporal Porter told his mother, "We got the evidence on him. Why don't you make him tell the truth" or "tell him to tell the truth". Flamer also testified that Corporal Porter told his mother about some of the evidence the police had which involved her son, Flamer, in the murder of her sister and brother-in-law, that, "she (his mother) wouldn't listen to me. She was crying. I couldn't get nothing through to her. I felt everything was against me." Flamer's mother left the troop without any further communication with her son. It was after his mother left that Flamer then confessed to the police his participation in the horrible deaths which he and Denuty throughout their interrogation had each attributed to the other while maintaining his own innocence.

TRIAL

I

As to the guilt phase of the trial defendant asserts five grounds of error: (1) The Trial Court erred in sentencing defendant to multiple sentences on four counts of Murder in the First Degree, Robbery in the First Degree and Possession of a Deadly Weapon during the Commission of a Felony. (2) The Trial Court erred in denying defendant's Motion to Suppress a confession on the ground of illegal detention. (3) The Trial Court erred in denying defendant's Motion to Suppress evidence seized as a result of a search of his residence. (4) There was insufficient evidence to convict defendant of four charges of Murder in the First Degree since there were only two victims. (5) There was insufficient evidence to convict defendant of Robbery in the First Degree and two charges of Murder in the First Degree with Robbery in the First Degree as the underlying felony. We consider those assertions seriatim.

II

The defendant contends that since he was indicted for Possession of a Deadly Weapon During the Commission of a Felony (Murder in the First Degree), separately indicted for four charges of Murder in the First Degree arising out of the use of a deadly weapon in two, and the perpetration of Robbery in the other two, and since the facts required to establish the Weapons and Robbery offenses require proof of the murders, the murders are lesser

included offenses in the Weapons and Robbery charges.

In support of that contention defendant cites 11 Del.C. § 206[3] and relies upon that part of this Court's opinion in Mackie v. State, Del. Supr., 384 A.2d 625 (1978) which states:

> "We find ambiguity in the first sentence of § 206(b) when read in relation to § 206(a). In order to remove the ambiguity and give meaning and purpose to § 206 taken as a whole, we think the first sentence of § 206(b) must be read as follows: "A defendant may be convicted of an offense not charged in the indictment or information if included in an offense charged in the indictment or information." As so construed and applied in the instant case, § 206(a)(1) may have barred a separate conviction on the weapon-possession offense if it had not been separately charged in the indictment; but since the weapon-possession offense was separately charged in this indictment, a separate conviction thereupon, is proper under Monie. Compare Bremer v. State, Md.App., 18 Md. App. 291, 307 A.2d 503 (1973); Comm. ex rel. Curry v. Myers, Pa. Super., 195 Pa. Super. 480, 171 A.2d 792 (1961); United States v. Busic, 3 Cir. (Jan. 5, 1978)."

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3. 11 Del.C. § 206 reads in its pertinent part as follows:

> (a) When the same conduct of a defendant may establish the commission of more than 1 offense, the defendant may be prosecuted for each offense. The defendant's liability for more than 1 offense may be considered by the jury whenever the State's case against him for each offense is established in accordance with § 301 of this title. He may not, however, be convicted of more than 1 offense if:
>
> (1) One offense is included in the other, as defined in subsection (b) of this section; or
>
> * * *
>
> (b) A defendant may be convicted of an offense charged in the indictment or information. An offense is so included when:
>
> (1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; or . . .

Taken out of context one might interpret that quote from Mackie as did the defendant. But we hold that the Murder charges in this case are not lesser included offenses of the Weapons and Robbery offenses. In so holding we apply the same rationale as we stated in Whalen v. State, Del. Supr., 434 A.2d 1346,1357 (1980).

> "Applied literally, the above quoted language of § 206 might lead to the conclusion that Rape First Degree is a lesser included offense of Felony Murder (Rape), once the former may be 'established by the proof of the same or less than all the facts required to establish the commission of the' latter. However, we do not believe that the Legislature intended such a literal application. Prior to the enactment of § 206, this Court rejected the contention that the underlying felony is a 'lesser offense included in the greater crime of (felony) murder...' Jenkins v. State, Del. Supr., 240 A.2d 146, 149 (1968), aff'd, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969). We find nothing in the provisions of §206 or elsewhere in the Delaware Criminal Code which indicates an intention to legislatively overrule the Jenkins holding.
>
> Moreover, the societal interests sought to be protected by the statutes here involved are entirely separate and distinct. The Rape statute seeks to protect women from sexual assault, while the Murder statute seeks to protect human life. Consequently, we believe that the Legislature intended to leave the Jenkins rule intact when enacting § 206, and we hold that Rape is not a lesser included offense of Felony Murder (Rape). Compare Whalen v. United States, supra, 445 U.S. at 712, 100 S.Ct. at 1449, 63 L.Ed.2d at 730 (Rehnquist, J., dissenting). Therefore, we conclude that the Legislature did intend to authorize separate convictions and sentences for Felony Murder and the underlying Rape First Degree in this case."

The societal interests sought to be protected by the statutes

here involved are entirely separate and distinct. The murder statute seeks to protect human life. The weapons' statute seeks to discourage the possession of a deadly weapon during the commission of a crime. The robbery statute seeks to protect people from the forcible taking of their property. Consequently we conclude the General Assembly intended the Murder offenses and the underlying Weapons and Robbery offenses to be separate offenses, subject to separate convictions and sentences.

In Evans v. State (Evans I), Del. Supr. 420 A.2d 1186 (1980) this Court held that multiple sentences for Manslaughter, Assault in the Second Degree, and Possession of a Deadly Weapon During the Commission of those Felonies violated defendant's constitutional guarantees against double Jeopardy under the Fifth Amendment. That decision tracked this Court's holding in Hunter v. State, (Hunter I), Del. Supr. 420 A.2d 119 (1980). The judgments in Hunter and Evans were reversed by the United States Supreme Court and remanded for further consideration in light of Albernaz v. U.S., 450 U.S. 333 (1981).[4] Upon reconsideration of Hunter I and Evans I in light of Albernaz we held that since the General Assembly intended to impose separate sentences for the offenses involved even though factually the offenses were indivisible, multiple sentences for the offenses did not violate the Double Jeopardy Clause of the Fifth Amendment. Hunter v. State (Hunter II), Del. Supr. 430 A.2d 476 (1981);

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4. Delaware v. Hunter, 450 U.S. 991 (1981).
Delaware v. Evans, 450 U.S. 991 (1981).

Evans v. State, (Evans II), Del. Supr., 430 A.2d 481 (1981). In Evans v. State, Del. Supr., 445 A.2d 932, (1982) we extended the application of that holding to the Double Jeopardy Clause of the Delaware Constitution, Art. #8. In spite of defendant Flamer's plea that we arrive at a different result in this case, multiple sentencing in this case falls squarely within the settled law of this State unless the United States Supreme Court guides us otherwise in the future.

III

Defendant contends his taped confession made at the police troop after he had been brought before the Justice of Peace Court pursuant to the mandate of the arrest warrant and Justice of the Peace Criminal Rule 4 should be suppressed because he was under psychological custodial compulsion at the time, and it was obtained in violation of the Sixth and Fourteenth Amendments' guarantee of the assistance of counsel.[5] Defendant relies upon Massiah v. United States, 337 U.S. 201 (1964) and its recent progeny. It is unquestioned that a criminal defendant is entitled to the assistance of counsel at all critical stages of the judicial process. But as the Supreme Court has stated:

> "There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. See Kirby v. Illinois, 406 US 682, 32 L Ed 2d 411, 399 US 1, 26 L Ed 2d 387, 90 S Ct 1999. But its basic contours, which are identical in state and federal contexts, Gideon v. Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 23 Ohio Ops 2d 258, 93 ALR2d 733; Argersinger v. Hamlin, 407 US 25, 32

5. This contention was raised by the Court sua sponte, the initial contention of defendant for suppression of the taped February 8, 1979 statement being based upon illegal detention and involuntariness.

> L Ed 2d 530, 92 S Ct 2006, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments mean at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him- "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" Kirby v. Illinois, supra, at 689, 32 L Ed 2d 411, 92 S Ct 1877. See Powell v. Alabam, supra, 77 L Ed 158, 53 S Ct 84 ALR 527; Johnson v. Zerbst, 304 US 458, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357; Hamilton v. Alabam, 368 US 52, 7 L Ed 2d 114, 82 S Ct 157; Gideon v. Wainwright, supra; White v. Maryland, 373 US 59, 10 L Ed 2d 193, 83 S Ct 1050; Massiah v. United States, 337 US 201, 12 L Ed 2d 246, 84 S Ct 1199; United States v. Wade, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926; Gilbert v. California, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951; Coleman v. Alabama, supra, Brewer v. Williams, 430 U.S. 387, 398-399 (1977).

Assuming in this case for purpose of argument that the Sixth and Fourteenth Amendments right to counsel attached at the time of defendant's initial appearance before the Justice of the Peace as claimed, we first review the totality of the circumstances to determine if Flamer's conduct following his arrest and prior to the taking of the taped confession constituted a waiver of that right since:

> "It was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 US, at 464, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, Carnley v. Cochran, 369 US 506, 513, 8 L Ed 2d 70, 82 S Ct 884 cf. Miranda v. Arizona, 384 US, at 471, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR2d 974,

and the courts indulge in every reasonable presumption against waiver, e.g., Brookhart v. Janis, supra at 4, 16 L Ed 2d 314, 86 S Ct 1245; 7 Ohio Misc 77, 36 Ohio Ops 2d US 60, 70, 86 L Ed 680, 62 S Ct 457. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. Schneckloth v. Bustamonte, 412 US 218, 238-240, 36 L Ed 2d 854, 93 S Ct 2041; United States v. Wade, 388 US at 237; 18 L Ed 2d 1149, 87 S Ct 1926."
Brewer v. Williams, supra at 404.

The thrust of defendant's compulsion argument is that the mental coercion of the police interrogation and oppressive custodial presence, the wilful disregard of the Justice of the Peace Court's commitment order, and the modified "Christian Burial" speech had done their damage, and the Fifth Amendment warnings required by Miranda v. Arizona, 394, U.S. 436 (1966) and given defendant prior to taping his confession became a mere empty formality.

The modified "Christian Burial" speech referred to by defendant came within a matter of minutes after defendant's upset mother had left the police troop without any supportive communication with defendant. Corporal Porter testified at trial that the following exchange between himself and defendant occurred:

> "Detective Callaway walked on into the back room. So I went to the cell door and opened up the cell door and I was talking to him by myself, one-on-one, and I asked him, I said, "Do you believe in God?" and he said, "Yeah". I said, "Then you got to believe in Heaven and hell, right?". He said

> "Yeah". I said, "Well, then you're going to burn in hell unless you get straight with me about what's happened today" or "what happened yesterday. I want you to tell me." I said, "You have to clear your conscience of what's going on" and this is when he started weakening up a little bit. He had some tears in his eyes and he said, "Okay. I'll talk to you." That's when I took him out of the cell."

At the Suppression Hearing Detective Porter testified to a completely different exchange as follows:

> "Flamer was placed in the cell and I was there in the hallway. He started saying, "Hey" like this. I walked over to the cell and I said, "Yeah". He said, "I want to talk to you." And I said, "Okay. Are you going to tell me the truth." He said, "Right". So I went around to the front office and got the key to the cell and got him out of the cell. Took him in the back office which would be the Detectives' office. It would be located on the northeast section of the building. Detective Brode was with me the whole time and it was at this time that Flamer gave me a statement."

There is no issue raised by defense counsel in this appeal of any physical or abusive tactics of the police during interrogation and custody, although we are mindful and consider as a part of the totality of circumstances, the testimony of defendant as to his fear of retribution, the failure of the police to give him alcohol and cigarettes, or to provide him with a warm comfortable place to sleep or permit him to call his mother. Assuming as we have that the Sixth and Fourteenth Amendments right to counsel attached in this case we are also mindful that absent proof by the State of a knowing and intelligent relinquishment or abandonment of that right there can be no waiver. Although defendant did not request counsel at any stage of his interrogation, the right to counsel does not depend upon a request for

counsel. As a matter of federal constitutional law this defendant was entitled to legal representation during any interrogation following his arraignment, and the presumption against waiver places a heavy burden on the State to overcome that presumption.

In our overview of the evidence adduced at the hearings before the Court on defendant's Motion to Suppress and before the Court and jury at trial, we see the defendant as a twenty-five year old male who reached the eleventh grade of school, a convicted felon, and one who at the outset informed the police he knew his rights. There is no contention that he was not on numerous occasions given his constitutionally required rights as set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Nor is there any contention that defendant from the moment of arrest until contact was made with him through the Public Defender's office, ever attempted to invoke any of the Miranda rights. Instead, when confronted with the physical evidence seized by the police at his home, the blood on the coat he was wearing when he was arrested, the blood under his fingernails, and the articles belonging to the victim Byard Smith taken from one of his companions at the time of arrest, defendant volunteered fictitious stories of his complicity in the crimes while at the same time denying that he was guilty of killing anyone. He first told the police he was home asleep, that Andre Deputy aroused him, and that he went to the murder scene to help Deputy take the fruits of the murder to defendant's house. Defendant next told the police that he, Johnny Christopher and Andrew Deputy,

had gone into the victims' home, and that it was Johnny who did the stabbing. In the entire record of this case there appears to be no time except initially when he claimed to be home asleep, that defendant denies his participation in the robberies and murders, although throughout, including the taking of his recorded statement, he steadfastly denies actually inflicting the fatal wound upon either victim. Neither is there any evidence in the record of this case that defendant was so religiously oriented that the modified "Christian Burial" speech had the effect upon this defendant as it did upon the defendant in Brewer v. Williams, 430 U.S. 387 (1977). Keeping in mind also that in Brewer the defendant at the time of being given the "Christian Burial" speech was represented by counsel and the police had agreed to refrain from any interrogation of defendant, we are satisfied that Brewer is clearly inapposite to this case.

The confession given on tape by defendant adds little to what the police already knew about this case except to clarify defendant's actual participation and locate one of the murder weapons. The tape of defendant's confession is replete with previously verified detail, and the entire tenor of the interrogation as one listens to the tape evidences a voluntary trustworthy statement of truth and personal involvement in the heinous murder of defendant's own aunt and uncle by marriage. We are fully satisfied that defendant knowingly, intelligently and voluntarily waived any Sixth and Fourteenth Amendments right to counsel he might have had. Defendant's Fifth Amendment rights under Miranda are not under attack.

> "If you find the testimony to be conflicting by reason of inconsistencies, it is your duty to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you cannot do this, then it is your duty and privilege to give credit to that portion of the testimony which, in your judgment, is most worthy of credit and disregard any portion of the testimony which, in your judgment, is unworthy of credit. In so doing, you should take into consideration the demeanor of the witnesses as they testified before you, their apparent fairness in giving their testimony, their opportunities for learning and knowing the facts about which they testified, and any bias or interest that they may have concerning the outcome of this case."

Under the totality of the circumstances as we have stated them previously, we are satisfied that the Court committed no error in failing to follow historical precedent which in itself does not clearly enunciate or establish a requirement on the part of the Trial Court to submit specifically the factual issue of voluntariness to the jury particularly in the absence of a request. See Lego v. Twomey, 404 U.S. 491 (1972) which held that a defendant does not have a constitutional right, after a trial judge has ruled adversely on his claim that his confession was involuntary, to have the jury decide the claim anew.[7]

7. See also DRE 104(a)(c) which establishes clearly that preliminary questions concerning the admissability of evidence shall be determined by the Court, and that hearings on the admissability of confessions shall in all cases be conducted out of the hearing of the jury. The Delaware Uniform Rules of Evidence had been promulgated by this Court two weeks prior to the trial of this case but were not effective at the time of trial. However, the now effective DRE 104(a)(c) crystallizes in this State that which historically has been unsaid emphatically and clearly. In the past there were those who opined that the Massachusetts rule permitted the jury to consider admissability as well as weight. It is now clear that the jury has no part in the admissability process and is limited to the jurors' determination of the weight and credibility they are to give a confession admitted into evidence.

IV

Defendant contends the denial of his motion to suppress certain evidence seized as a result of a warrantless search of his residence violated his right against unreasonable search and seizure protected by the Fourth Amendment and Article I § 6 of the Delaware Constitution. Defendant claims the State failed to bear its burden of proving voluntary consent and authority to consent. Citing Bumper v. North Carolina, 391 U.S. 543 (1968) defendant claims the State offered no proof that his elderly grandmother's consent to admit the officers into the residence was anything more than an unknowing, unintelligent acquiescence resulting from the sudden confrontation by police officers looking for her grandson. Additionally, it is asserted that no proof was offered by the State of the grandmother's authority to permit an entry into defendant's second floor room where the actual search and seizure of evidence was begun.

In considering this issue we must examine the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Mrs. Benson, defendant's grandmother, owned the four-room residence which was occupied at the time by Mrs. Benson, defendant's father, Andre Deputy, and defendant. Mrs. Benson testified on behalf of defendant during the penalty phrase of this case and indicated that defendant had lived with her all

his life. But there is no evidence in the record that Mrs. Benson shared her right to control the entire premises with her grandson or anyone. Therefore, we are satisfied that defendant's contention is totally without merit. Mrs. Benson without hesitation or pressure by the police invited the officers into her home and freely permitted them access to the upstairs bedroom where defendant sometimes slept when the weather was not cold, as it was on the night in question. There is no evidence of any subterfuge by the police as in Bumper v. North Carolina, supra., the evidence seized was in plain view once entrance was gained, and Mrs. Benson clearly had sufficient control of the premises to bind defendant by her consent under Jenkins v. State, Del. Supr., 230 A.2d 262 (1967).

V

Defendant contends there was insufficient evidence to allow convictions on four counts of murder in the first degree when there are only two dead people. This argument is based upon the assertion that it was error to allow the jury to consider the two theories advanced by the State, i.e., intentional murder and felony murder. Defendant argues that one murder theory is included in the other, and that inconsistent findings of fact are required to establish the offenses.

Among other charges, defendant was indicted and convicted of four counts of Murder in the First Degree. Counts I and II allege that the defendant violated 11 Del.C. § 636(a)(1), which

provides in pertinent part as follows:

> (a) A person is guilty of murder in the first degree when:
> (1) He intentionally causes the death of another person.

Counts III and IV allege that the defendant violated 11 Del.C. § 636(a)(2), which provides in pertinent part as follows:

> (a) A person is guilty of murder in the first degree when:
> (2) In the course of and in furtherance of the commission . . . of a felony . . . he recklessly causes the death of another person.

As can be seen, the defendant was indicted on four (4) counts in one indictment of violating 11 Del.C. § 636, murder in the first degree, but under different subsections of the statute. Subsection (1) requires the State to prove the defendant "intentionally" caused the death of another person. "Intentionally" is defined in pertinent part as follows:

> (a) INTENTIONALLY - A person acts intentionally with respect to an element of an offense when:
>
> (1) If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause that result.

11 Del.C. § 231.

Subsection (2) requires the State to prove the defendant "recklessly" caused the death of another person, while committing or in the furtherance of, in the instant case robbery, a felony. "Recklessly" is defined in pertinent part as follows:

> (c) RECKLESSLY - A person acts recklessly with respect to an element of an offense, when he is aware of and consciously disregards a substantial and unjustifiable

> risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

11 Del.C. § 231.

Defendant in claiming that he cannot be convicted on one charge of "intentionally" killing and a second charge of "recklessly" killing the same person, bases his argument on 11 Del.C. § 206(a)(3);(b)(1)&(3) which provide:

> (a) One offense is included in the other, as defined in subsection (b) of this section; or
>
> * * *
>
> (3) Inconsistent findings of fact are required to establish the commission of the offenses.
>
> * * *
>
> (b) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:
>
> (1) It is established by the proof of the same or less than all of the facts required to establish the commission of the offense charged; or
>
> * * *
>
> (3) It involves the same result but differs from the offense charged only in the respect . . . a lesser kind of culpability suffices to establish its commission.

Defendant contends that each theory requires proof of the same or less than all the facts required for the other theory, since both theories involve the same result and, only difference being the "quality of 'intention'" and that

reckless killing is included in the intentional killing.

If state of mind were the only element it would be true in this case that "intentional" is a higher state of mind than "reckless" and that the murders here fall within the ambit of intentional even though charged under the felony-murder theory. As Chief Justice Burger recently stated in Hopper v. Evans, ___ U.S. __ __, 72 L.Ed.2d 367, 374, 102 S.Ct. 2049, 2054 (1982):

> "It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon, engaged in an armed robbery, admits to shooting his victim in the back in the circumstances shown here."

In final analysis what we must look at in our interpretation is the statutory "offense" not the facts of a given charge as defendant has here. The factor that elevates a reckless killing, under § 636(a)(2), to an equal plane with subsection (1), is the added element not required for subsection (1), that the killing occur "in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom." This is commonly known as the felony murder rule. In the present case that felony was robbery and subsection (2) is not included within subsection (1). Subsection (1), is conversely not included in subsection (2), because of the higher state of mind required for it as opposed to a felony murder theory. A charge under § 636(a)(2) is not a lesser included offense to a charge under § 636(a)(1) even though both charges arise out of the same

incident and require proof of the same result. Neither is there anything inconsistent in charging defendant with both theories or with the jury believing defendant acted intentionally during the commission of the robbery, since a finding of intent obviously includes a finding of recklessness. 11 Del.C. § 253.

VI

Finally defendant contends there was insufficient evidence to allow a conviction of Robbery in the First Degree and two convictions of Murder in the First Degree with the Robbery being the underlying felony of the charges brought under the felony-murder theory of 11 Del.C. § 636(a)(2).

It is defendant's contention that the State did not meet its burden of proving beyond a reasonable doubt that defendant used force on the murder victims to overcome their resistence to the taking of their money.

Among other offenses, Flamer was convicted by the jury of Robbery First Degree, in violation of 11 Del.C. § 832(a)(1), and two counts of Murder First Degree, in violation of 11 Del.C. § 636(a)(2). Section 832(a)(1) reads as follows:

> "A person is guilty of robbery in the first degree when he commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
>
> (1) Causes physical injury to any person who is not a participant in the crime;...."

Robbery Second Degree, necessary to Robbery First, is defined as follows:

"A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of force upon another person with intent to:

(1) Prevent or overcome resistance to the taking of the property or to the retention thereof immediately after the taking; or

(2) Compel the owner of the property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft." 11 Del.C. § 831.

Section 636(a)(2) reads:

"A person is guilty of murder in the first degree when:

* * *

(2) In the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person."

This section is a statement of the felony murder rule. Robbery was the underlying felony involved in this case.

Defendant claims the jury could only speculate on what happened. They could not have made a common sense, logical determination based on the evidence before them as to whether or not the Smiths were killed because they were resisting the taking of their money, or whether they were killed in a reckless frenzy or intentionally, and then the perpetrator took their money.

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5. "A person is guilty of theft when he takes, exercises control over or obtains property of another person intending to deprive him of it or appropriate it." 11 Del.C. § 841.

On the other hand, the evidence of robbery is overwhelming as evidenced by the items seized by the police during their investigation of the murders, the circumstances of the killing as detailed throughout this opinion, and as stated inter alia by defendant in his transcribed statement as follows:

> A. Andre Deputy. He said are you going to do that thing and I said, What thing? He said, you know what we discussed. I said that robbing you call it. He said, yeah.
>
> Q. Robbing who?
>
> A. Mr. Byard. And I said, 'Man I don't know.'
>
> A. Yeah and then he seen me ston and I was standing there shaking like this and looking at the blood and he and I did and I went over there like this stabbing her. Cause Uncle Byard come off the couch and then he already had her killed and then he threw him on the floor. That's when he got the wallets and money cause Uncle Byard had his pants on the what's you call it and she had her money in her pants and in her drawers or something.
>
> Q. Just you and Andre? Who planned it? Whose idea was it to go over and rob them?
>
> A. Andre.
>
> Q. Were you planning on killing them from the beginning?
>
> A. It wasn't suppose to have went?
>
> Q. What way was it supposed to have went?
>
> A. We were suppose to have stocking put over our heads.
>
> Q. Put over your heads?
>
> A. Uh huh.
>
> Q. And were you going to hold them up?

A. Yeah.

Q. How do you think you would have been able to get this without your own relatives knowing who you were because they would have recognized your voice?

A. We were supposed to describe our voice.

Q. Supposed to what?

A. Describe our voice. Andre said go ahead.

Q. You were going to put the stocking mask on your head right and you were going to go over there but you said you saw Andre pick up the knife in your house?

A. Uh huh.

* * * *

Q. Did you? So you two planned it? What night did you plan it, that very same night?

A. No we talked about that about a week ago.

Q. So you set in your house on Mispillion Street, your mother's house?

A. Andre was telling me how it should be done.

Q. Andre was telling you how it should be done? This was like a week before, right? And how did Andre say it should be done?

A. We was suppose to go in there and I was suppose to get the money while he held them off with the gun.

Q. Did you know when they were supposed to get the check?

A. Yeah, Andre said she got it on the 3rd or 1st.

Q. Did he have any idea how much the check would be?

A. No he didn't say he said Social Security should be around about at least $200.00.

Q. How did he know that it would be the 1st or 3rd of the month?

A. Cause my grandmom gets a Social Security check.

* * * *

A. Backseat. He also, Andre, took the shotgun with him and he didn't use that.

Q. Where is the shotgun?

A. It should be in the trunk where he put it.

Q. In the trunk of the car?

A. Yeah. I forgot all about it.

Q. Whose shotgun was that?

A. It was hisen I guess.

Q. Oh he took it with him when he went down to do this?

A. Yeah.

Q. He was going to use the shotgun?

A. Yeah.

Q. Did he take the shotgun in the house with him?

A. He hid it beside the building."

Defendant's argument that there is insufficient evidence in the record to convict defendant of Robbery is without merit.

* * * *

For the reasons stated the convictions and sentences are affirmed, with the exception of the mandatory death sentence imposed by the jury following the bifurcated penalty hearing.

Issues raised in this appeal pertaining to the death penalty are presently pending for final disposition by the Supreme Court of the United States. See Zant v. Stephens, ____ U.S. ____, 102 S.Ct. 1856 (1982); Barclay v. Florida, ____ U.S. ____, 51 U.S.L.W. 3362 (1982). The majority of the Court, therefore, deems it

advisable to withhold decision on the death penalty phase of this appeal until the United States Supreme Court has spoken. Jurisdiction is reserved as to death sentence. No mandate on any aspect of this appeal will issue until further order of the Court.[4]

4. McNeilly, J. respectfully dissents as to withholding decision on the sentence of death.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM HENRY FLAMER,

Defendant Below,
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below,
Appellee.

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No. 60, 1980

rec'd 3/24/83

SUPREME COURT OF THE STATE OF DELAWARE
RECEIVED and FILED
FEB 18 1983
J. E TOWNSEND, Jr.
Clerk

Submitted: February 15, 1983
Decided: February 18, 1983

Before HERRMANN, Chief Justice, McNEILLY, QUILLEN, HORSEY and MOORE, Justices, constituting the Court en Banc.

ORDER

This 18th day of February, 1983,

Upon due consideration of the Motions for Reargument filed herein by both the appellant and the appellee,

IT IS ORDERED that both Motions be and they are hereby DENIED; Justice McNeilly adhering, however, to his dissent as to the withholding of decision upon the sentence of death (f.n. 4, p. 33 of the Opinion filed herein February 7, 1983), and Justice Moore joining him therein.

BY THE MAJORITY OF THE COURT:

Chief Justice

EXHIBIT "B"

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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BY THE MAJORITY OF THE COURT:

Chief Justice

APPENDIX "B"